No.82-1267

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA ex rel.
GERALD JEROME ROCK,
Petitioner-Appellant,

vs.

PHILLIP COOMBE, JR., Superintendent,
Respondent-Appellee.

SUPPLEMENTAL AND REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Should the Judgment of the Circuit Court Be Reversed and this Case Remanded for Consideration in Light of *Connecticut v. Johnson*?

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THE JUDGMENT OF THE CIRCUIT COURT SHOULD BE REVERSED AND THIS CASE REMANDED FOR CONSIDERATION IN LIGHT OF CONNECTICUT v. JOHNSON

This Court, in recently deciding *Connecticut v. Johnson* (51 LW 4175), has put to rest the question whether a jury instruction in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979) can ever be considered harmless error. Johnson unequivocally held that, except in rare situations, the *Sandstrom* instruction cannot be considered harmless error.

The judgment of the Court of Appeals herein which held the giving of a *Sandstrom* instruction harmless error must be reversed.

The fact that in *Johnson*, as in the instant case, the jury was otherwise properly instructed on the presumption of innocence, burden of proof and intent did not cure the error.

Such proper instructions could not correct an un-

constitutional charge requiring the jury to draw a conclusive presumption on the issue of intent which is "—the functional equivalent of a directed verdict on that issue" *Johnson* at 4178.

INTENT WAS NEVER CONCEDED BY THE DEFENSE BUT WAS ALWAYS AN ISSUE IN THE INSTANT CASE

Johnson recognizes certain 'rare situations' in which a *Sandstrom* instruction could be harmless error. One such situation is defendant conceding the issue of intent. Respondent, despite the explicit finding of the Court of Appeals that intent was prominently in issue (n.7, p. 21A), still maintains that defendant, in offering the defense of non-participation, conceded intent. However, Johnson left:

> "—it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury" (supra, at 4179).

Moreover, *Johnson* speaks of a situation in which the defendant *admitted* the act was intentional as part of his presentation of a certain defense. Appellant made no such admission. Appellant's reliance on a defense not involving the issue of intent did not act to relieve the prosecution of its burden of proving this essential element.

Johnson also deals with respondent's argument that the particularly brutal nature of the attack in the instant case, makes defendant's claim of lack of proof of intent to kill inconceivable:

> The fact that the reviewing court may review the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decision of guilt are to be made.
>
> supra, at 4178.

THE CIRCUIT COURT'S JUDGMENT WAS DECIDED ON A FINDING OF HARMLESS ERROR

Respondent's contention that the Court of Appeals did not reach the question of harmless error but rather concluded that the charge as a whole was constitutional under *Sandstrom v. Montana*, is incorrect.

The Court of Appeals, in its very first paragraph discussing the Sandstrom claim, recognized that there was *Sandstrom* error.

> The first portion of the statement appears to run afoul of *Sandstrom*. Although it is qualified to some extent by the clause beginning "unless" (cites omitted), we do not regard that qualification sufficient to cure the *Sandstrom* error (supra, p. 19A).

The Court's evaluation of the charge as a whole was merely the method of analysis employed in reaching a final determination on the issue of harmless error.

In the final paragraph of its decision, the Court made it abundantly clear that it found the *Sandstrom* error to be harmless:

> In sum, in light of the [trial] court's constant reiteration that the burden remained on the State to prove each element of the crime beyond a reasonable doubt and that intent was to be determined from all of the circumstances, and in the absence of any basis for inferring that the jury fastened upon the presumption language instead of determining intent from all of the circumstances, we conclude that the *Sandstrom* errors were harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967). The judgment of the District Court is affirmed.
>
> supra, p. 24A

It is indisputable that the Circuit Court recognized that the presumption-of-intent instruction was in violation of *Sandstrom v. Montana*. The question they then addressed was whether such a *Sandstrom* instruction, considered in the context of the charge as a whole, was harmless error. Their holding that it was, must be reversed in light of *Connecticut v. Johnson*.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be reversed and this case remanded for consideration in light of *Connecticut v. Johnson*.

Respectfully submitted,

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